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Summary record of the 3362nd meeting
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Chair: Mr. Iwasawa

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The meeting was called to order at 10.15 a.m.

Organizational and other matters, including the adoption of the report of the Working Group on Communications (*continued*)

Draft general comment No. 36 on article 6 of the Covenant (Right to life) (*continued*) (CCPR/C/GC/R.36/Rev.2)

1. **Mr. Shany** (Rapporteur for the general comment) said that there were two texts before the Committee: the original draft general comment No. 36 on article 6 of the Covenant (Right to life) (CCPR/C/GC/R.36/Rev.2), and a document containing the revised version of paragraphs 37, 41, 42, 46 and 48 of the draft general comment, as amended on the basis of the Committee's discussion at its 3353rd and 3355th meetings.

Paragraph 37

2. **Mr. Shany** (Rapporteur for the general comment) said that the first sentence of paragraph 37 had been revised to underscore that the most serious crimes necessarily involved "intentional killing"; thus, the phrase "such as those involving premeditated murder or genocidal killings" had been replaced with the phrase "involving intentional killing". In the second sentence, the phrase "and other economic [and political] offences" had been inserted after the word "corruption", with the square brackets reflecting the fact that the Committee members' definitions of political crimes differed. He had rewritten the latter part of that sentence to better reflect the fact that other crimes, "although serious in nature, can never justify, within the framework of article 6, the imposition of the death penalty as a form of legal retribution". The phrase "do not manifest the extraordinary high levels of violence, utter disregard for human life, blatant antisocial attitude and irreversible consequences that could" had been deleted.

3. In the third sentence, the words "or not preventing it" had been deleted. The latter part of the last sentence, beginning with the words "can be imposed, if at all," had been replaced with the phrase "is not imposed for crimes which do not [objectively] qualify as crimes of the most serious nature"; the word "objectively" had been placed in brackets for the Committee's further consideration.

4. **Mr. Heyns** proposed inserting, in the first sentence, the word "only" before the phrase "crimes of extreme gravity" and removing, in the second sentence, the reference to the death penalty "as a form of legal retribution", as there were other grounds on which the death penalty could be justified by States parties. He expressed doubt as to the inclusion of the word "objectively" in the last sentence. Rather than referring to "crimes of the most serious nature", he would prefer reverting to the language of the Covenant, which described such offences as "the most serious crimes".

5. **Ms. Brands Kehris** said that she supported leaving the words "political crimes" in the second sentence in square brackets until the Committee's second reading.

6. **Mr. Shany** (Rapporteur for the general comment) said that he agreed with all the amendments proposed.

7. *Paragraph 37 was provisionally adopted, subject to minor drafting changes.*

Paragraph 41

8. **Mr. Shany** (Rapporteur for the general comment) said that, he had made a number of amendments to paragraph 41 based on his understanding that the Committee wished to maintain the current structure of the paragraph but to use more precise language. In addition to minor drafting changes made throughout the paragraph, the third sentence had been reformulated in negative terms to read "As a result, the death penalty can never be imposed, if it was not available for the offence at the time of its commission". In the fourth sentence, the word "unclearly" had been replaced by "vaguely" and the words "essentially subjective criteria" had been replaced with the phrase "subjective or discretionary considerations". In the fifth sentence, a definition of the Latin term "*lex mitior*" had been provided and the phrase "finds expression" had been replaced with "finds partial expression". The last sentence had been simplified to read "The retroactive application of the abolition of the

death penalty to all individuals charged or convicted of a capital crime derives from the fact that the need for applying the death penalty cannot be justified once it has been abolished."

9. **Mr. Politi** said that, in the third sentence, the use of the word "available" in the phrase "as a result that penalty can never be imposed if it was not available for the offence" made the death penalty seem like a positive tool. He suggested replacing the words "not available for the offence" with the phrase "not provided for in respect of the offence".

10. **The Chair** said that he supported Mr. Politi's proposed amendment, and suggested that the phrase should be further changed to "not provided by law for the offence".

11. **Mr. Heyns** said that it was important to use plain language whenever possible, in order to make the text accessible to a wider readership. The second sentence could be redrafted to read "this principle is also reflected in article 15 (1) of the Covenant." Further, the third sentence might be simplified for the benefit of readers without a legal background, who might not be familiar with the concept "*lex mitior*". He also proposed simplifying the phrase "which finds partial expression in".

12. **Ms. Cleveland** proposed deleting the phrase "when imposing sentences", as the benefit of lighter penalties applied any time after the crime had been committed, and not just during the sentencing process.

13. **Mr. Santos Pais** drew attention to the problem that, in certain countries where the death penalty had not been abolished but was not foreseen for a particular type of crime, the State could decide to apply it to that offence. He wondered whether the paragraph applied to both civil and military law.

14. **Mr. Shany** (Rapporteur for the general comment) said that the words "not available" would be replaced with "not provided by law". While he agreed that the general comment needed to be expressed as plainly as possible, it also needed to appeal to a broad audience, including judges. The reference to *nulla poena* was sufficiently clear. He agreed that the phrase "when imposing sentences" could be deleted.

15. The initial draft of the text had drawn a distinction between the death penalty and "certain capital offences". That section had been cut as it had been cumbersome and paragraph 36 already dealt with the retroactive application of the death penalty.

16. The issue of de facto and de jure abolition had been discussed at the Committee's 118th session. The general consensus had been that introducing a moratorium was not equivalent to abolishing the death penalty and did not constitute a reasonable interpretation of the Covenant. If the death penalty applied to certain offences under military law, it had not been formally abolished and therefore provisions relating to the reintroduction of the death penalty did not apply.

17. **The Chair** said that he was of the view that the Latin phrases should be retained, as should the words "finds partial expression".

18. **Ms. Kran** proposed adding the Latin terms to the footnotes, in a similar manner to an academic text. Thus, the body of the text would feature accessible language and appeal to a broad readership, while the additional information provided in the footnotes would be useful to legal experts.

19. **Mr. Shany** (Rapporteur for the general comment), noting that the Latin terms had been placed in parentheses, said that it was not the Committee's practice to use footnotes to clarify a text, but rather only to indicate sources.

20. **Ms. Cleveland**, referring to the concerns expressed in respect of the phrase "which finds partial expression" proposed replacing the phrase with "which finds expression in the third sentence of article 15, paragraph 1, requiring, in the context of the death penalty, States parties to ....".

21. **Mr. Shany** (Rapporteur for the general comment) said that he would prefer to place the phrase in square brackets and return to it on second reading if necessary.

22. **Ms. Seibert-Fohr** said that, as a general rule, she supported placing definitions and explanations in footnotes.

23. **Ms. Brands Kehris** said that the text was clear as currently drafted. Although it would be useful to consider providing definitions and explanations in future documents, it would be unwise to change the Committee's approach to the general comment at such a late stage.

24. *Paragraph 41, as amended, was provisionally adopted.*

Paragraph 42

25. **Mr. Shany** (Rapporteur for the general comment) said that a number of revisions had been made to paragraph 42. In addition to minor drafting changes made throughout the paragraph, the first two sentences had been combined to read "States parties that have not yet abolished the death penalty must respect article 7 of the Covenant, which bars certain methods of execution." An additional sentence had then been inserted to read "Failure to respect article 7 would inevitably render the execution arbitrary in nature and thus also in violation of article 6."; that was now the only reference to article 6 in the paragraph. The third sentence of the revised paragraph now began with the words "The Committee has already opined that" before going on to list only those execution methods specifically referred to in the Committee's jurisprudence; relevant footnotes had also been added. The reference to "cruel, degrading and inhuman" treatment had been removed and a new fourth sentence now read "For similar reasons, other painful and humiliating methods of execution are also unlawful under the Covenant." In the fifth sentence, the qualifying phrase "as a rule" had been inserted between the phrase "Failure to provide individuals on death row with timely notification about the date of their execution constitutes" and the words "a form of ill-treatment". In the last sentence, the word "exceptionally" and the phrase "including solitary confinement" had been placed in square brackets for the Committee's further consideration. He would be in favour of retaining the latter phrase and removing the square brackets.

26. *Paragraph 42, as amended, was provisionally adopted.*

Paragraph 43

27. **Mr. Heyns** said that he wished to return to paragraph 43, which had been provisionally adopted at the Committee's 3355th meeting, in order to express concerns that, in the first sentence, the Committee seemed to be indicating that all violations of article 14 resulted in violations of article 6.

28. **Mr. Shany** (Rapporteur for the general comment), agreeing that the language used was too strong, proposed replacing the phrase "also violate by necessary implication" with the words "may also violate".

29. **The Chair** suggested that the issue should be discussed at the Committee's second reading of the draft general comment.

30. *It was so decided.*

Paragraph 46

31. **Mr. Shany** (Rapporteur for the general comment) said that, in addition to making a number of minor editorial changes, he had redrafted the first sentence in negative terms to read "The death penalty must not be imposed in a discriminatory manner contrary to the requirements of articles 2 (1) and 26 of the Covenant. A new second sentence, currently placed in brackets, had been proposed by Ms. Cleveland at the Committee's 3355th meeting; it read "In applying the death penalty, courts must not exercise their discretion to take individual characteristics into account in a manner that results in unequal application of the death penalty." References had also been included in footnotes.

32. **Ms. Cleveland**, referring to the sentence in brackets, said that her proposal had stemmed from her concern that courts should take the personal circumstances of offenders into consideration. In the United States, experience had revealed that such an approach could result in unequal application of the death penalty on the basis of racial factors, and thus had been ruled as discriminatory and unconstitutional. The Committee should exercise

caution if suggesting that courts must take an offender's circumstances into account, to ensure that they did not do so in a discriminatory manner.

33. **Mr. Heyns**, while acknowledging Ms. Cleveland's point, said that the issue of discriminatory application was already covered in the last sentence of the revised paragraph, and that the wording in square brackets was superfluous. As an unintended consequence, that formulation could potentially be used to justify the introduction of a mandatory death penalty.

34. **Mr. Politi** said that he had reservations about the wording of the sentence in square brackets in that it suggested imposing limits on court decisions or directing judges with regard to how they exercised judicial discretion.

35. **Ms. Seibert-Fohr** suggested that the issue could be discussed at the second reading; the Committee could at the same time review paragraph 39 in order to specify the subjective elements that might come into play and to add a reference to non-discrimination.

36. **Mr. Santos Pais** said that he agreed with Ms. Seibert-Fohr's suggestion. Furthermore, it was important to bear in mind that individual characteristics were not the same thing as personal circumstances.

37. **The Chair** said that he agreed that the third sentence covered the issues raised in the sentence in square brackets.

38. **Mr. Shany** (Rapporteur for the general comment) said that he would remove the sentence in square brackets and would, moreover, review paragraph 39 with regard to the possible addition of a reference to non-discrimination.

39. *Paragraph 46, as amended, was provisionally adopted.*

Paragraph 47

40. **Mr. Shany** (Rapporteur for the general comment), referring to paragraph 47, which had been provisionally adopted by the Committee at its 3355th meeting, said that, while he had been unable to find other examples in case law of the imposition of death sentences on the basis of religious edicts, there were numerous examples of their imposition on the basis of military orders. For that reason, he proposed that the words "or military order" should be inserted after the words "religious edict" in the last sentence of the paragraph.

41. *It was so decided.*

Paragraph 48

42. **Mr. Shany** (Rapporteur for the general comment) said that in the first sentence of paragraph 48, the phrase "after all judicial appeal procedures have been exhausted" now read "after an opportunity to resort to all judicial appeal procedures was provided to the convict". At the end of that sentence, the reference to "requests for a private pardon (Diyyai) from family members of crime victims" had been replaced with the phrase "requests for an official or private pardon". In addition, he had aligned the language of the last sentence with that of general comment No. 33 so that it now read "Failure to implement such interim measures is incompatible with the obligation to respect in good faith the procedures established under the specific treaties governing the work of the relevant international bodies."

43. **Mr. Heyns** said that he had reservations about the use of the term "convict" in the first sentence. Paragraphs 48 and 49 both appeared to deal with non-judicial measures; it might be preferable for the Committee to address judicial measures in paragraph 48 and non-judicial measures in paragraph 49. He would also appreciate clarification of the term "international monitoring bodies" in the third sentence.

44. **Mr. Shany** (Rapporteur for the general comment) said that paragraph 48 dealt with temporal aspects — namely the fact that if a case or decision was pending, the detainee should not be executed — while paragraph 49 related to non-judicial remedies, such as pardons. He was not opposed to removing the reference to "international monitoring bodies".

45. **Ms. Cleveland** said that in lieu of using the term "monitoring bodies", the expression "inter alia" could be inserted earlier on so that the third sentence would read "Such interim measures are designed to allow review of the sentence before, inter alia, international courts, human rights courts and commissions, and United Nations treaty bodies". She suggested replacing the word "convict" with the word "defendant".

46. **Mr. Politi** proposed moving the reference to "international monitoring bodies" to immediately before the words "United Nations treaty bodies" so that the last part of the sentence would read "before international courts, human rights courts and commissions, and international monitoring bodies such as the United Nations treaty bodies".

47. **Mr. Santos Pais** proposed replacing the word "convict" with "sentenced person".

48. **Mr. Shany** (Rapporteur for the general comment) said that he agreed with Mr. Santos Pais' and Mr. Politi's respective proposals.

49. *Paragraph 48, as amended, was provisionally adopted.*

The meeting was suspended at 11.25 a.m. and resumed at 11.40 a.m.

50. **The Chair** drew the Committee's attention to the original version of the draft general comment (CCPR/C/GC/R.36/Rev.2), which contained the remaining paragraphs to be considered by the Committee for adoption on first reading.

Paragraph 49

51. **Mr. Shany** (Rapporteur for the general comment) said that paragraph 49 related to article 6 (4) on the right of individuals to seek pardon or commutation. Its aim was to encourage States to regularize the pardon process, and to ensure that it was timely and clear and did not involve a preponderant role for victims' families.

52. **Mr. Santos Pais** proposed replacing the word "clarity" with the word "certainty" in the last sentence.

53. **Ms. Seibert-Fohr** proposed deleting the third sentence, about which she had reservations. In its place, the Committee could instead indicate that which was expected of States at minimum, as it had done in the last sentence. She also proposed deleting the word "still" at the beginning of the fourth sentence. She was not certain that victims' families should play any role in public pardon procedures.

54. **Mr. Ben Achour** said that the fourth sentence referring to the role of victims' families appeared to contradict paragraph 48, which referred to a private process defined by the family members. He would prefer either to delete that sentence or to reword it to ensure consistency with paragraphs 48.

55. **Mr. de Frouville** said that he agreed with the statements made by Ms. Seibert-Fohr and Mr. Ben Achour. He further proposed that, in the first sentence, the words "considered and" [*examinées et*] should be inserted before the words "conclusively decided upon" [*dûment tranchées*] and that, in the second sentence, the words "exceptionally burdensome" [*exceptionnellement contraignantes*] should be replaced with a weaker formulation.

56. **Mr. Politi** proposed that the word "meaningfully" should be inserted into Mr. de Frouville's proposed formulation, such that it read: "meaningfully considered and conclusively decided upon".

57. **Ms. Cleveland** said that the reference to the preponderant role of victims' families could be reformulated, as, while the Committee was concerned that their influence might result in the death penalty being carried out, it was not necessarily concerned that their influence might result in the death penalty not being carried out.

58. **Mr. Shany** (Rapporteur for the general comment) said that he agreed with the proposal to insert the words "meaningfully considered and" before "conclusively decided upon" and the proposal to replace the word "clarity" with the word "certainty". Acknowledging the concerns raised with regard to the slight tension between paragraphs 48 and 49, he agreed that the example involving victims' families could be deleted. In his view, the third sentence was important to the structure of the paragraph, and he would prefer to

retain it. Instead of deleting the word "exceptionally" in the second sentence, he proposed replacing it with the word "necessarily", as, in his view, the adjective "burdensome" had to be qualified.

59. **Mr. Muhumuza** said that, while the families of victims should not play a "preponderant" role in pardon or commutation procedures, it should be recalled that, in a number of African countries, victims did play some kind of role in such procedures.

60. **Mr. Shany** (Rapporteur for the general comment) said that, in drafting the paragraph, he had borrowed language from paragraph 15 of the Committee's concluding observations on the fourth periodic report of Yemen (CCPR/CO/84/YEM), in which concern had been expressed regarding the "preponderant role of the victim's family" in deciding whether or not the death penalty should be carried out. Private pardons were mentioned in paragraph 48 of the draft general comment, but they were dealt with more substantively in paragraph 49.

61. **Ms. Cleveland** proposed that an explanation of the broader context of the reference to the Committee's concluding observations on the fourth periodic report of Yemen, namely the issue of "blood money", should be given in parentheses in the relevant footnote.

62. **Ms. Seibert-Fohr** said that, as the concept of private pardons was mentioned and effectively endorsed in paragraph 48, it was not necessary to mention it again in paragraph 49. Indeed, the manner in which it was dealt with in paragraph 49 might create the false impression that the Committee did not endorse the use of private pardons in any circumstances. If necessary, the concept could be developed further in paragraph 48.

63. **Ms. Brands Kehris** said that, in her view, it was important to retain the word "preponderant" in paragraph 49. Paragraph 49 developed, rather than contradicted, the ideas put forward in paragraph 48. While the Committee might wish to delete the reference to the role of victims' families for other reasons, she did not see how its deletion would improve consistency.

64. **Ms. Cleveland** said that she was of the same view. The Committee was not endorsing the concept of private pardons in all circumstances in paragraph 48. In paragraph 49, the Committee was dealing with private pardons as a potential obstacle to clemency rather than as a means of securing clemency. In that connection, she proposed that a clear explanation of the Committee's position, namely that victims' families should not be afforded a particularly preponderant role in obstructing access to clemency, should be inserted at the end of the second sentence.

65. **Ms. Seibert-Fohr** proposed that, in the fourth sentence, the words "a preponderant role" should be replaced with "an effective veto".

66. **Mr. Heyns** said that, in his view, the current language was adequate. It was stated in paragraph 48 that private pardons were permissible and in paragraph 49 that their absence should not be inferred to lead to an execution. The Committee was expressing caution with regard to the possibility of overreliance on private pardons.

67. **Mr. Ben Achour** said that he wished to know whether the envisaged scenario, namely the execution of a death penalty following the intervention of the victim's family, was a hypothetical example or one taken from State practice.

68. **Mr. Shany** (Rapporteur for the general comment) said that, as far as he was aware, it was a purely hypothetical scenario. In his view, the Committee should retain the language originally proposed, namely the language used in its concluding observations on the fourth periodic report of Yemen.

69. **The Chair** said that he took it that the Committee wished to endorse the amendments involving the insertion, in the first sentence, of the words "meaningfully considered and" before the words "conclusively decided upon" and the replacement, in the fifth sentence, of the word "clarity" with the word "certainty" and, moreover, that the Committee agreed that any further amendments to the paragraph would be considered at the Committee's second reading of the draft general comment.

70. *It was so decided.*

71. *Paragraph 49, as amended, was provisionally adopted.*

Paragraph 50

72. **Mr. Shany** (Rapporteur for the general comment) said that many of the issues discussed in relation to paragraph 8, on abortion, were also relevant to paragraph 50. He proposed that the last three sentences of paragraph 50, which raised sensitive issues of morality, should be deleted on the grounds that such issues had been excluded in the context of abortion. The Committee was nevertheless on safe ground in focusing on minors and pregnant women, as both examples were mentioned explicitly in article 6 (5) of the Covenant. It was possible that paragraphs 50 and 51 would be merged at a later stage.

73. **Ms. Kran** said that she supported the proposal to delete the last three sentences, as their retention would lead to internal inconsistencies in the draft. The deletion of the last three sentences would ensure that the Committee was focusing on the protection of minors and pregnant women. The work of the Committee on the Elimination of Discrimination against Women offered a useful background to the issues addressed in the paragraph.

74. **Mr. Heyns** said that the first sentence dealt with the application of the death penalty "to minors", which would seem to exclude its application to persons who were no longer minors, but who had been minors at the time of their offence. Moreover, there was no universal definition of the term "minor". For those reasons, he proposed that the wording of article 6 (5) of the Covenant, which dealt with the imposition of death sentences "for crimes committed by persons below 18 years of age", should be used. Furthermore, in some cases, the age of the offender could not be established. In that connection, he proposed that the paragraph under consideration should reflect paragraph 39 of general comment No. 10 on children's rights in juvenile justice of the Committee on the Rights of the Child, in which it had been established that, if the age of the offender was in dispute, he or she was entitled to the benefit of the doubt.

75. **Mr. Fathalla** said that, owing to its ambiguity, the word "minor" should be avoided. He would be grateful for clarification regarding the words "by necessary implication" in the second sentence.

76. **Ms. Seibert-Fohr** said that, in her view, the fifth sentence should be retained, but the third and fourth sentences could be deleted, as it was not necessary to explain the rationale for the protection of minors and pregnant women, both of which were mentioned explicitly in article 6 (5) of the Covenant. If the fifth sentence gave rise to any inconsistencies with other parts of the draft, they could be dealt with in due course.

77. **Mr. de Frouville** said that he endorsed Ms. Kran's comments. With regard to the applicability of the Covenant to unborn fetuses, he noted that, following extensive discussions during the adoption of paragraph 8 of the draft general comment, the Committee had decided to adopt a cautious approach. That approach should be maintained to save time and avoid controversy. In his view, the language used in article 6 (5) of the Covenant required no additional explanation, although the temporal dimension could be brought out more clearly.

78. **Mr. Ben Achour** said that, as article 6 (5) of the Covenant mentioned both persons aged under 18 years and pregnant women, the draft general comment offered an opportunity to explore the manner in which the protection afforded to the two categories differed. While the topic of abortion raised complex and divisive issues, the prohibition against the application of the death penalty to pregnant women seemed to him more straightforward. For that reason, he did not support the proposal to delete the last three sentences. Nevertheless, it would be advisable to include a clear statement to the effect that, for persons aged under 18 years, the applicability of the prohibition against the application of the death penalty depended on the age of the offender at the time of the offence. The issue had recently been brought into focus by a number of decisions of the Supreme Court of the United States.

79. **Ms. Abdo Rocholl** said that she supported the proposal to delete the last three sentences.

80. **Ms. Cleveland** said that she, too, supported the proposal to delete the last three sentences, as they were not in line with the approach that the Committee had adopted in the context of paragraphs 8 and 9 of the draft. Article 6 (5) of the Covenant stipulated only that persons aged under 18 years and pregnant women were entitled to protection, and she would be strongly opposed to the inclusion of a speculative reference to unborn fetuses.

81. **Ms. Pazartzis** said that, for the reasons given by Mr. de Frouville and Ms. Kran, she supported the proposal to delete the last three sentences.

82. **Ms. Brands Kehris** said that she too supported the proposal to delete the last three sentences. Nevertheless, if those three sentences were deleted, the remaining sentences would amount to little more than a reproduction of article 6 (5) of the Covenant. For that reason, she would not be opposed to incorporating Mr. Heyns' proposed amendments.

83. **Mr. Politi**, supported by **Mr. Santos Pais**, said that he supported the proposal to delete the last three sentences and the proposal to use the wording of article 6 (5). At some stage, consideration should also be given to cases in which the age of the offender was in dispute.

84. **Mr. Heyns** said that, if his proposal to use the wording of article 6 (5) of the Covenant were implemented, the second sentence would be made redundant. Furthermore, if that proposal were implemented and the Committee also decided to retain the last three sentences, it would be necessary to delete those elements of the third and fourth sentences that were not relevant to the application of the death penalty to persons aged 18 years and over.

85. **Mr. Shany** (Rapporteur for the general comment) said that he agreed with the proposal to use the language of article 6 (5) of the Covenant, as it would clarify that persons who were no longer minors, but who had been minors at the time of their offence, were entitled to special protection. Indeed, it would serve to clarify the distinction between the protection afforded to minors and that afforded to pregnant women: persons who had committed offences as minors enjoyed permanent protection, whereas pregnant women were protected only for the duration of their pregnancy. He also accepted the proposal to incorporate language from general comment No. 10 of the Committee on the Rights of the Child.

86. **Ms. Seibert-Fohr** said that it should be clearly stated in the second sentence that, with regard to persons aged under 18 years, the applicability of the prohibition against the application of the death penalty depended on the offender's age at the time of the offence.

87. **Mr. de Frouville** said that he endorsed the comments that had been made with regard to the second sentence. In that connection, he wished to draw attention to paragraph 75 of general comment No. 10 of the Committee on the Rights of the Child, which dealt explicitly with the issue of age in the context of the imposition of death sentences.

88. **Ms. Cleveland** proposed that the second sentence should be amended to read: "Whereas for minors, the prohibition applies to all persons who were aged under 18 years at the time of the offence, regardless of their age at the time of trial or sentencing; for pregnant women, it pertains to the time of carrying out the sentence."

89. **Mr. Shany** (Rapporteur for the general comment) said that he agreed with the proposal to redraft the first half of the second sentence and the proposal to insert a sentence on cases in which the age of the offender was in dispute. He noted that, if the word "minors" were to be replaced with the words "persons aged under 18 years", the specific wording proposed for the second sentence would have to be reconsidered. He would produce a revised version of the paragraph for the Committee's consideration on the basis of the comments made by members.

Paragraph 51

90. **Mr. Shany** (Rapporteur for the general comment) said that paragraph 51 extended the application of article 6 (5) of the Covenant to a number of vulnerable groups not mentioned explicitly in that article. He had held informal discussions with the Special Rapporteur on the rights of persons with disabilities, who had emphasized the need to avoid

perpetuating negative stereotypes of persons with disabilities. In the light of those discussions, he proposed that the first sentence should be amended to read: "For rationales such as limited ability to defend oneself on an equal basis with others and, in some circumstances, reduced moral culpability, diminished ability to understand the reasons for the sentence and the exceptional harshness of deprivation of life for the individual and his or her family, States parties would normally be required to refrain from applying the death penalty to other categories of individuals."

91. **Mr. Fathalla** said that the Committee seemed not to be adopting a consistent approach. The decision had been taken not to explain the rationale for the prohibition against the application of the death penalty in paragraph 50, yet it was explained in paragraph 51.

92. **Mr. Heyns** said that, in his view, a good balance had been struck between the need to avoid the risk of perpetuating negative stereotypes of persons with disabilities and the need to leave open the option of staying executions. Nevertheless, he would be grateful for clarification regarding the term "serious mental disabilities".

93. **Ms. Seibert-Fohr** said that paragraph 51 served to extend the application of article 6 (5) of the Covenant to individuals belonging to specific vulnerable groups. However, some of the reasons given for that extension, for example reduced moral culpability, should already have entitled such individuals to protection under properly conducted judicial proceedings. It followed that, if a death sentence had been imposed on an individual of reduced moral culpability, the judicial proceedings under which he or she had been sentenced had, by virtue of that fact, not been conducted properly. In her view, the Committee should focus on cases in which the application of the death penalty would in itself constitute an arbitrary detention of life, a category that would include cases in which reduced moral culpability, for example, had been acquired after the sentence had been imposed. In addition, she would be in favour of rewording the phrase "other categories of individuals". The term "serious mental disabilities" should also be replaced, perhaps with the term "grave psychosocial impairments".

94. **Ms. Cleveland** said that, with regard to the apparent inconsistency between paragraphs 50 and 51, it was necessary to explain the rationale for affording protection to those categories of person that were not mentioned explicitly in article 6 (5) of the Covenant. In general, she supported the Rapporteur's proposed revisions. She proposed that the term "serious mental disabilities" should be replaced with the term "serious psychosocial and intellectual impairments". In addition, to bring the paragraph into line with recent developments at the international level, she would be in favour of replacing the reference to lactating mothers, which seemed arbitrarily to make protection dependent on a particular biological function, with a reference to persons with very young dependent children. In her view, it was extremely important to retain the existing emphasis on the prohibition against the application of the death penalty to persons with serious intellectual disabilities. Lastly, she wondered whether the words "could constitute" in the last sentence were sufficiently strong in emphasis.

95. **The Chair** suggested that the Committee should continue its consideration of paragraph 51 at its next subsequent meeting on the draft general comment.

96. *It was so decided.*

The meeting rose at 1 p.m.